

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

THOMAS COOK; MEGAN DRESCH;
LAURA GALABURDA; JACK GLOVER;
DAVID HALL; MONICA HILL; JENNY
LYNN KOPFSTEIN; JENNIFER McGINN;
JUSTIN PEACOCK; JAMES E.
PIETRANGELO II; DEREK SPARKS;
STACY VASQUEZ,

Plaintiffs,

v.

DONALD H. RUMSFELD, Secretary of
Defense; TOM RIDGE, Secretary of Homeland
Security; UNITED STATES OF AMERICA,

Defendants.

Civil Action No. 04-12546 GAO

**CONSENT MOTION FOR LEAVE TO
FILE MEMORANDA OF LAW IN EXCESS OF 20 PAGES**

Pursuant to Local Rule 7.1(B)(4), defendants Donald H. Rumsfeld, Secretary of Defense; Tom Ridge, Secretary of Homeland Security; and the United States of America, hereby request that the parties be granted leave to file memoranda of law in excess of 20 pages. In support thereof, defendants state as follows:

1. In this action, which was filed on December 6, 2004, plaintiffs, twelve gay or lesbian former members of the Army, Navy, Air Force, and Coast Guard, contend that the Act of Congress regarding homosexual conduct in the Armed Forces of the United States, see National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1670-73, codified at 10 U.S.C. § 654, and the implementing Department of Defense (“DoD”) Directives, are unconstitutional on their face and as applied to the plaintiffs. Specifically, plaintiffs contend

that the statute and implementing DoD Directives are unconstitutional because they (1) infringe upon what plaintiffs describe as their “fundamental liberty interests,” in violation of the Fourth, Fifth and Ninth Amendments; (2) abridge their rights to freedom of speech, in violation of the First Amendment; and (3) deny them equal protection of the laws, in violation of the Fifth Amendment’s Due Process Clause. Plaintiffs seek declaratory and injunctive relief.

2. Defendants anticipate filing a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6), on February 7, 2005.

3. The parties anticipate that it will be necessary to file memoranda of law in excess of 20 pages in support of, and in opposition to, the government’s motion to dismiss. In addition to addressing the merits of whether plaintiffs have stated a claim upon which relief can be granted regarding their claims that the challenged policy infringes on their rights to liberty and privacy, abridges their rights to freedom of speech, or denies them the equal protection of the laws, the parties also will need to address in their briefing the history and background of the challenged statute and implementing DoD Directives; debate whether case authority from other circuits which have considered the constitutional questions raised in plaintiffs’ Complaint is persuasive; and discuss the impact, if any, of the Supreme Court’s decision in Lawrence v. Texas, 539 U.S. 558 (2003).

4. Given these considerations, and because the adjudication of an Act of Congress is “the gravest and most delicate duty that [a] Court is called upon to perform,” Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J.), the parties respectfully request that they be given leave to file memoranda of law of 35 pages. A proposed order accompanies this motion for the Court’s convenience.

5. On January 26 and February 2, 2005, undersigned counsel for the defendants, Assistant U.S. Attorney Mark T. Quinlivan, spoke with co-counsels for the plaintiffs, Jonathan A. Shapiro, Esq., and Stuart F. Delery, Esq., to confer regarding this matter. On February 3, 2005, Mr. Delery stated in an electronic mail message that he and Mr. Shapiro had reviewed and consented to this motion and the accompanying proposed order.

WHEREFORE, with good cause having been shown, defendants respectfully request that this Court grant the parties leave to file memoranda of law in support of, and in opposition to, the government's motion to dismiss, of 35 pages.

Respectfully submitted,

MICHAEL J. SULLIVAN
United States Attorney

By: /s/ Mark T. Quinlivan
MARK T. QUINLIVAN
Assistant United States Attorney
United States Attorney's Office
John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 9200
Boston, MA 02210
617-748-3606

Dated: February 3, 2005

CERTIFICATE PURSUANT TO LOCAL RULE 7.1(a)(2)

Pursuant to Local Rule 7.1(a)(2), I certify that, on January 26 and February 2, 2005, I conferred with co-counsels for the plaintiffs, Jonathan A. Shapiro, Esq., and Stuart F. Delery, Esq., regarding this motion, and that, on February 3, 2005, Mr. Delery stated in an electronic mail message that he and Mr. Shapiro had reviewed and consented to this motion and the accompanying proposed order.

/s/ Mark T. Quinlivan
MARK T. QUINLIVAN
Assistant United States Attorney

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

THOMAS COOK; MEGAN DRESCH;
LAURA GALABURDA; JACK GLOVER;
DAVID HALL; MONICA HILL; JENNY
LYNN KOPFSTEIN; JENNIFER MCGINN;
JUSTIN PEACOCK; JAMES E.
PIETRANGELO II; DEREK SPARKS;
STACY VASQUEZ,

Plaintiffs,

v.

DONALD H. RUMSFELD, Secretary of
Defense; TOM RIDGE, Secretary of Homeland
Security; UNITED STATES OF AMERICA,

Defendants.

Civil Action No. 04-12546 GAO

**ORDER GRANTING THE CONSENT MOTION FOR LEAVE TO
FILE MEMORANDA OF LAW IN EXCESS OF 20 PAGES**

This matter having come before the Court on the Consent Motion for Leave to File Memoranda of Law in Excess of 20 Pages, the Court being fully advised in this matter, and finding that there is good cause to grant motion.

IT IS ORDERED as follows:

1. That the parties shall have leave to file memoranda of law of 35 pages in support of, and in opposition to, the defendants' anticipated motion to dismiss for failure to state a claim upon which relief can be granted. .

IT IS SO ORDERED,

This ___ day of February 2005.

HON. GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE